Office Supreme Court, U.S.
FILED
APR 27 1983
ALEXANDER L. STEVAS,
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

CAUSE NO. 82-1241

E. WAYNE PINCKARD, ET AL,
Petitioners

v.

KENNETH R. PINCKARD,
Respondent

PETITIONERS RESPONSE TO "RESPONDENT'S BRIEF IN OPPOSITION"

EDMUND L. COGBURN
DOW, COGBURN & FRIEDMAN
2300 Coastal Tower
Nine Greenway Plaza
Houston, Texas 77046
(713) 626-5870

Attorneys for Petitioners

Alpha Law Brief Co., Inc.—5606 Parkersburg—Houston, Texas 77036—223-3003

SUBJECT INDEX

	Page
RESPONDENT'S "REASONS FOR DENYING THE WRIT" ARE FRIVOLOUS	2
(a) The judgment sought to be reviewed is final for the purposes of this Court	2
(b) Regardless of whether or not the state courts did or did not "expressly" pass on our federal questions, the questions were in fact raised and the rulings disposed of them	3
(c) The Petition for Writ of Certiorari is timely, since Petitioners acted diligently to secure review as far as they could go in the state courts before turning to this Honorable Supreme Court of the United States	4
(d) Petitioners did not waive any rights by their failure to challenge a previous injunction	5
(e) Only by the most procrustean torture of meanings can Respondent even suggest that "pleadings, evidence and law support the subject order."	6
SUMMARY	8
CERTIFICATE OF SERVICE	9

LIST OF AUTHORITIES

CASES

	Page
American Railway Express Co. v. Levee, 263 U.S. 19 (1923)	4
Austin v. Keefe, 402 U.S. 415 (1971)	3
Curtis Publishing Co. v. Butts, 388 U.S. 130 (1967)	6
Nebraska Press Asso. v. Stuart, 423 U.S. 1327 (1975)	2

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

CAUSE NO. 82-1241

E. WAYNE PINCKARD, ET AL,
Petitioners

v.

KENNETH R. PINCKARD,
Respondent

PETITIONERS RESPONSE TO "RESPONDENT'S BRIEF IN OPPOSITION"

The Petitioners, E. Wayne Pinckard ("Wayne"), PBI houston, Inc., formerly Pinckard Brothers Interests, Inc. ("PBI"), W. Howard Smith, The Bradford Group, Inc. ("Bradford"), Gene Phillips ("Phillips") and Syntek Corporation ("Syntek"), respectfully request that this Court review the following as a response to "Respondent's Brief in Opposition".

RESPONDENT'S "REASONS FOR DENYING THE WRIT" ARE FRIVOLOUS

(a) The judgment sought to be reviewed is final for the purposes of this Court.

It seems clear that violations of fundamental First Amendment rights in the nature of prior restraint are subject to review by this Honorable Supreme Court of the United States even when they occur through pre-trial orders or temporary injunctions, regardless of whether or not such orders or injunctions are subject to ultimate dissolution upon final trial. An example of this may be found in *Nebraska Press Asso. v. Stuart*, 423 U.S. 1327 (1975), opinion by Blackmun, J., as Circuit Justice, granting reapplication for a stay of an order restricting pretrial coverage by the news media concerning alleged sexual assaults upon and murders of six members of a family. Justice Blackmun's opinion points out that the issue raised is "one that centers upon cherished First and Fourteenth Amendment values; that the challenged state-court order obviously imposes significant prior restraints on media reporting; that it therefore came to (him) 'bearing a heavy presumption against its constitutional validity . . .' ".

The opinion in *Nebraska Press* goes on to say:

> Where, however, a direct prior restraint is imposed upon the reporting of news by the media each passing day may constitute a separate and cognizable infringement of the First Amendment. . . . To this extent, any First Amendment infringement that occurs with each passing day is irreparable . . . in this sense, *delay itself is a final decision* . . .

> . . . Still, the likelihood of irreparable injury to First Amendment interests requires me to act . . .

In organization for a better *Austin v. Keefe*, 402 U.S. 415 (1971), this Honorable Supreme Court of the United States applied the same strict standards to a temporary injunction infringing First Amendment rights by restraining the distribution of pamphlets, leaflets or literature within a suburb. The opinion noted:

> Any prior restraint on expression comes to this Court with a "heavy presumption" against its constitutional validity (citations omitted). Respondent thus carries a heavy burden of showing justification for the imposition of such a restraint . . .

In short, with First Amendment rights involved, the NLRB cases discussed by Respondent are irrelevant, to the point of frivolity. Because of the daily loss of First Amendment rights, the temporary injunction issued by the trial is, in fact, a "final" judgment for the purposes of the jurisdiction of this Court.

(b) Regardless of whether or not the state courts did or did not "expressly" pass on our federal questions, the questions were in fact raised and the rulings disposed of them.

Respondent seems to suggest to this Honorable Court that state courts or lower federal courts can, effectively, discourage this Court from entertaining jurisdiction over serious denials of constituitonal rights by simply failing to discuss or write on these questions when they are raised. It is certainly true, that the Court of Appeals in its three paragraph unpublished opinion, made no men-

tion of the federal questions. If lower courts can escape review by simply omitting the tough legal questions from thier opinions, then reversal will become rare indeed. Whether or not precedent has been established should not be the criteria for this Honorable Court, since, otherwise, the door will therefore be opened wide for the abuse of constitutional rights through the facile tactic of ignoring them. It is our assumption that this Honorable Court will treat this argument with the contempt which it deserves.

(c) The Petition for Writ of Certiorari is certainly timely, since Petitioners acted diligently to secure review as far as they could go in the state courts before turning to this Honorable Supreme Court of the United States.

Respondent cites *American Railway Express Co. v. Levee,* 263 U.S. 19 (1923), a case which holds *exactly the opposite* of the position for which it is cited.

In fact, *American Railway Express* is almost on "all fours" with our case. The suit was brought in a Louisiana court, appealed to the Court of Appeals unsuccessfully and then application was made to the Supreme Court of Louisiana for Writ of Certiorari, "refused for the reason that the judgment is correct". This is almost exactly the path followed in our case. The opinion of this Honorable Supreme Court of the United States in *American Railway Express* noted that a preliminary objection was "urged that the present Writ of Certiorari was addressed to the Court of Appeals, and not to the Supreme Court . . .".

The opinion pointed out that "when the jurisdiction was declined, the Court of Appeals was shown to be

the highest court of the state in which a decision could be had". On the other hand, this did not change the time limitations because it was appropriate to apply to the Supreme Court and was only when the Supreme Court refused to take jurisdiction did the appellate time limits begin running against the Petitioner with respect to the Writ of Certiorari to the Supreme Court of the United States. This is clearly set forth in the following language on page 20 of the opinion:

> . . . Of course, the limit of time for applying to this Court was from the date when the Writ of Certiorari was refused.

Surely, it is the height of frivolity to cite this case for a proposition diametrically opposed to the principle upon which it was decided.

(d) Petitioners did not waive any rights by their failure to challenge a previous injunction.

Respondent suggests that Petitioners waived their First Amendment rights by failing to object to an original injunction which, itself, likewise violated First Amendment rights of Petitioners. In fact, under the Rules of Civil Procedure of the State of Texas, Petitioners have every right to move to dissolve an original temporary injunction short of appeal which they determined to do. The Motion to Dissolve the Original Temporary Injunction was the pleading upon which a trial type hearing took place which resulted in the issuance of the order of which we complain. Contrary to the statement at page 4 of the Respondent's "Brief in Opposition", the Petitioners *did* "seek dissolution of the foregoing quoted portion" (involving prior restraint), since their application for dis-

solution sought dissolution of the injunction as a whole. (The whole, necessarily, includes its parts.)

Again, by the citation of *Curtis Publishing Co. v. Butts*, 388 U.S. 130 (1967), Respondent has cited a case which holds to the contrary of the proposition for which it is cited. In *Butts* the opinion states:

> Where the ultimate effect of sustaining a claim of waiver might be an imposition on that valued freedom, we are unwilling to find waiver in circumstances which fall short of being clear and compelling . . .

(e) Only by the most procrustean torture of meanings can Respondent even suggest that "pleadings, evidence and law support the subject order."

Apparently, the Brief suggests that an Application to Enjoin Surveillance or Investigation is a sufficient pleading to support an order enjoining Petitioners from divulging information regarding the personal deportment of the Respondent. Such an argument, again, fails to rise above the level of frivolity.

There is no pleading regarding "personal deportment" in the Respondent's "First Supplemental Application for Temporary Injunction" and the personal deportment of Respondent has no demonstrated relationship to the "trash of Pinckard Development Corporation".

From an evidentiary point of view, the closest that Respondent can get to "personal deportment" is the fact that the investigators were "told to go to the home of Linda Applebaum, who was represented to such investigators as the Respondent's girlfriend", along with testi-

mony that the investigators did in fact go to her home. No where does the record reflect that any information was developed by going to Linda Applebaum's home and there is nothing in the record concerning the results of the investigation which reflects any information as to the "personal deportment" of the Respondent. At page 5 of the *Brief*, Respondent suggests that "surveillance of Respondent's friends or family and discussion of his personal deportment, have nothing to do with this case . . .". Whether they do or do not, there was no evidence concerning "discussion of his personal deportment" in the record, no evidence of what such "personal deportment" had consisted of, and no pleading in the record asking for an injunction against discussion of "personal deportment".

The record does not properly support an injunction against surveillance, since the record in no way reflects that there was any abuse of any legally protected right of Respondnt by the survillance in question. In fact, the surveillance did uncover information that was helpful to the Petitioners lawsuit. Regardless, discussion of personal deportment was not shown by the record or pleadings to be in any way related to the surveillance.

In fact, the trial court *did* abuse its discretion by temporarily enjoining the exercise of First Amendment rights without any justification shown by the record or shown by the *Brief* of Respondent. There was no showing that this order was necessary or even helpful in order to "preserve a fair trial". Comments about "harassment" in the Brief are pure conjecture, without any evidence to support them.

SUMMARY

The judgment complained of is a final one resulting in daily and continuing violations and restraints on First Amendment rights. The state courts did, in fact, pass on Federal Constitutional questions raised by Petitioners regardless of their discussion thereof. The Petition for Writ of Certiorari is timely, having been filed less than ninety days after the decision of the highest state court in which a decision could have been had, the Supreme Court of Texas, regardless of the fact that the Supreme Court of Texas in fact rejected such decision. There was no waiver of First Amendment rights which were diligently pursued. The pleadings, evidence and law furnished no support or excuse of any kind for the order of the trial court.

PREMISES CONSIDERED, THEREFORE, Petitioners pray for the Writ of Certiorari to be granted and the order of the trial court overturned as violative of First Amendment rights and for such other relief as may be found proper by this Honorable Court.

Respectfully submitted,

DOW, COGBURN & FRIEDMAN

Original Signed By
By: EDMUND L. COGBURN

EDMUND L. COGBURN
2300 Coastal Tower
Nine Greenway Plaza
Houston, Texas 77046
(713) 626-5870

Attorneys for Petitioners

CERTIFICATE OF SERVICE

I, Edmund L. Cogburn, do hereby certify that a true and correct copy of this Reply to Respondent's Brief in Opposition was mailed to Michael T. Powell, Brill, Brooks, Powell & Yount, 601 Jefferson Street, Suite 1060, Houston, Texas 77002, attorney of record for Kenneth R. Pinckard, Appellee and Respondent in this cause.

Signed this the 26 day of April, 1983.

Original Signed By
EDMUND L. COGBURN

EDMUND L. COGBURN